STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG BY CONSTRUCTION AND GENERAL LABORERS', LOCAL NO. 1334, AFL-CIO,

Complainant,

- vs -

CITY OF GREAT FALLS,

Defendant.

FINAL ORDER

* *

The Remedial Order was issued by Hearing Examiner Jack H. Calhoun on January 7, 1983.

Exceptions to the Remedial Order were filed by David V. Gliko, on behalf of the Defendant, on January 25, 1983.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Remedial Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Remedial Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 9th day of March, 1983.

BOARD OF PERSONNEL APPEALS

By John A. Uda
John A. Uda
Alternate Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 9th day of March, 1983:

David V. Gliko, City Attorney
City of Great Falls
P.O. Box 5021
Great Falls, MT 59403

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG BY CONSTRUCTION AND GENERAL LABORERS' LOCAL NO. 1334, AFL-CIO, Complainant, vs. CITY OF GREAT FALLS, Defendant.	REMEDIAL ORDER

* * * * * * * * * *

On June 10, 1982 the Montana Supreme Court affirmed the Board of Personnel Appeals final order in this matter dated October 12, 1979. Pursuant to that order the parties attempted to reach a settlement on the amount due Mr. Young, however, they were not successful. A hearing was held in Great Falls on September 30, 1982 for the purpose of determining that amount. Complainant was represented by Mr. D. Patrick McKittrick, Defendant by Mr. David V. Gliko.

FINDINGS OF FACT

1. Bruce Young was terminated by the City of Great Falls on October 31, 1978 in violation of 39-31-401(1), (3) and (4) MCA. He had worked as a laborer from May 2, 1978. Prior to that period of employment he had worked for the City from March 20, 1977 until December 30, 1977.

2. At the time of his termination Mr. Young's rate of pay with the City was $6.675 per hour pursuant to the provisions of the parties' collective bargaining agreement.

3. On July 1, 1979 the rate of pay for laborers was increased, through collective bargaining, to $7.055 per hour.

4. On July 20, 1979 the City re-employed Mr. Young as a laborer.

5. From October 31, 1978 until January 5, 1979 the City utilized the services of Harold Spilde as a laborer, he was junior to Mr. Young.

6. During the period from October 31, 1978 to July 20, 1979 the City used Comprehensive Employment and Training Act personnel to perform labor work, however, there were no permanent hires during that time.

7. Prior to Mr. Young's illegal discharge he was working 40 hours per week, since his reinstatement he has also been working 40 hours per week.

8. Subsequent to his discharge Mr. Young earned $194.70 one week of November, 1978 and $200.00 during one week of February, 1979.

9. During his period of unemployment from October 31, 1978 until July 20, 1979 Young made the following efforts to gain employment:

a. signed up on a weekly schedule at the union hall;

b. signed up each month at the Job Service office; and

c. contacted, on a regular basis, persons whom he knew to be prospective employers including Martin and Co. in Shelby, a beer distributor and a welding company.

10. The one week of work Young gained in February of 1979 was the result of his own efforts to gain employment, the week of work in November was the result of the Union's effort for him.

11. During the period in question, October 31, 1978 to July 20, 1979, labor type work was difficult to find in the

Great Falls area.

12. Bruce Young had gained seniority rights under the terms of the parties' collective bargaining agreement in existence at the time of the discharge on October 31, 1979.

13. At the time of his discharge Young had not signed up for City employee insurance as was required of all employees who wished to be covered.

14. The hours which Mr. Young would have worked or would have been paid for had he been a laborer with the City from October 31, 1978, through July 19, 1979, are as follows:

November 1978,	22 compensable days x 8 hrs.	= 176 hrs.
December 1978,	21 compensable days x 8 hrs.	= 168 hrs.
January 1979,	23 compensable days x 8 hrs.	= 184 hrs.
February 1979,	20 compensable days x 8 hrs.	= 160 hrs.
March 1979,	22 compensable days x 8 hrs.	= 176 hrs.
April 1979,	21 compensable days x 8 hrs.	= 168 hrs.
May 1979,	23 compensable days x 8 hrs.	= 184 hrs.
June 1979,	21 compensable days x 8 hrs.	= 168 hrs.
July 1979,	14 compensable days x 8 hrs.	= 112 hrs.

15. All holiday pay to which Young would have been entitled during the period in question has been included in the above calculations, i.e., the "compensable days" listing in finding No. 14 includes holidays for Montana public employees.

16. From May 2, 1978 Mr. Young would have begun earning vacation at the rate of 1.25 days per month, and would have been eligible to use his accumulated leave at the end of six months continuous employment, however, he was terminated just short of six months. Therefore, had he not been terminated, he would have earned vacation on 14 full months plus 80% of a full month (for part of July 1979) at 1.25 per month for a total of 18.30 days for the period May 1978 to July 20, 1979. Any vacation for which he was paid or which he used must be deducted from that total.

17. He would have earned sick leave at the rate of one day per month for the same period as in finding No. 16, therefore, as of the date of his reinstatement he would have had 14.8 days accumulated. Any sick leave for which he was actually paid in full or which he used must be deducted from that total.

18. As a City employee, Mr. Young was covered by the Public Employee Retirement System (PERS) and Social Security. The continuity of his employment was broken resulting in a break in the contributions made by the City and him to Social Security and the PERS fund.

19. Interest at an appropriate rate should be added to any amount of money due and owing Mr. Young.

20. No claim was made that overtime would have been worked during the period in question.

21. Mr. Young claimed no expenses for travel or moving for the purpose of seeking and securing employment during the term of his unemployment.

DISCUSSION

The primary issue raised under the remedial aspect of this proceeding is what amount of money and/or benefits, if any, are due and owing Bruce Young in order to make him whole pursuant to this Board's final order of October 12, 1979.

Section 39-31-406(4) MCA gives the Board of Personnel Appeals authority, where it finds an unfair labor practice, to order "...such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." Section 10(c) of the National Labor Relations Act is similar to 39-31-406(4) MCA and for that reason the National Labor Relations Board precedent

should be looked to for guidance. State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976). The NLRB attempts, in cases where employees have been illegally discriminated against, to fashion a remedy which will result in a restoration of the situation, as nearly as possible, to that which would have obtained but for the prohibited conduct. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941). Section 39-31-406(4) authorizes this Board to award back pay where it finds that the employer's unfair labor practice resulted in the employee's loss of wages. However, the employee is not relieved from an obligation to take reasonable steps to secure work during the period of discrimination and thereby mitigate the employer's back pay liability. NLRB v. Madison Courier, Inc., 82 LRRM 1667; Phelps, supra. Once the employee has established the amount of back pay due, the burden is on the employer to produce evidence to mitigate its liability. NLRB v. United Brotherhood of Carpenters & Joiners, 531 F.2d 1014, 100 LRRM 2769 (1979). The obligation of the wrongfully discharged employee is to make a reasonable effort to obtain interim employment, he is not held to the "highest standards of diligence." Airport Service Lines, 231 NLRB 137, 96 LRRM 1358 (1977). In McCann Steel Co. v. NLRB, 570 F.2d 652, 97 LRRM 2921 (CA6 1978) the circuit court agreed with the NLRB's policy of "reasonable exertion."

The question which must first be answered is whether the efforts made by Bruce Young to obtain interim employment over an eight and one-half month period discharged the duty incumbent upon him to exercise a reasonable effort to seek comparable work. Given the uncontroverted testimony of the union official familiar with the market for laborer type

work in and around Great Falls during that time and Young's own testimony and job seeking efforts, I must conclude that he did indeed make such effort. He signed up with the union each week and on one occasion got one week's work from those efforts. He signed up at the local Job Service office each month, but was not successful in obtaining work. He solicited the owner of Martin & Co. from Shelby, whom he knew, and obtained one week of work in Shelby. He contacted a local beer distributor on a regular basis although he could not remember exactly when and how often. He sought employment at Superior Welding, but again, could not say precisely when or how frequently. Mr. Young, whose testimony I credit, also testified that he probably asked a lot of people about work, but that he could not recall names, places or times. His lack of recall with respect to such specificity is understandable, he was discharged approximately three years prior to the remedial hearing. Yet, his testimony was clear and without internal contradiction. Neely's Car Clinic, 107 LRRM 1157 (1981). Although the labor market improved during the spring of 1979, the union official contended it was extremely difficult to get laborer work. The fact that Young twice obtained work of a one week duration speaks well for his efforts.

The next question raised here is whether the City had any obligation to employ Mr. Young beyond the date Mr. Spilde (refer to original findings in this matter) was terminated. The City contends that it would have terminated Mr. Young in any case on January 5, 1979, that January 5th should be the limit of its liability for back pay in this matter. I am not persuaded by the City's argument on this question. A review of the findings approved by this Board on October 12, 1979 and the decision of the Montana Supreme

Court reveals quite clearly that in addition to the laborer work being performed by Spilde, CETA employees with less seniority than Young continued to do laborer's work.

It is a well settled principal that the burden of proof is on the employer to show that it would not have had work available for an illegally discharged employee due to economic or other factors. NLRB v. Midwest Hanger Co., (CA8 1977) 550 F.2d 1181, 94 LRRM 2670; NLRB v. Mastro Plastics Corp., 354 F.2d 170, 60 LRRM 2576 (CA2 1965). That the City had labor work available, regardless of where the funds for which to pay for it came from, in itself dispells any notion that it would not have had work for Mr. Young beyond January 5, 1976. In M.S.P. Industries, Inc. v. NLRB, 568 FF.2d 166 (CA10 1977), 97 LRRM 2403, the circuit court stated, in response to the employer's argument that it was suffering economic problems which should bar any remedial order, "there is proof that not only was work available for laid off and discharged employees, but also that in some instances, new employees were hired during the period of 'substantial economic difficulties' to do work formerly done by discharged employees". (Citing NLRB v. Armcor Industries, 535 F.2d 239, 92 LRRM 2374.) However, an equally persuasive reason to reject the City's argument is that had he not been discriminatorily discharged, i.e., had he been allowed to remain as a City employee, he would have been able to challenge any lay off subsequent to January 5th on the basis of a contract violation (because CETA employees with less seniority were retained) or as a violation of CETA regulations. To the City's urging that Mr. Young was a temporary employee who would have been laid off in any case, suffice it to reiterate what has just been said - that laborer work continued to be done. NLRB v. Blue Hills Cemetery, Inc., 567 F.2d 529 (CA11 1977), 97 LRRM 2291.

From the foregoing I conclude that Bruce Young made a reasonable effort to obtain interim employment and that he is entitled to back pay and other benefits for the entire period in question from October 31, 1978 until July 20, 1979. The task which remains is to fashion a remedy which will restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. Phelps, supra. The Board's order to reinstate Mr. Young has been complied with. There still remain, however, the questions of: (1) how much back pay is due; (2) how much offset in interim earnings is to be applied; (3) how much interest is due; (4) how much vacation and sick leave credit should be allowed; (5) what are the City's obligations to PERS and Social Security; (6) are insurance premiums to be paid; and, (7) are there other benefits to which Mr. Young is entitled? Since the inception of the NLRA the NLRB has not allowed unemployment compensation benefits received by the discriminatee as an offset against back pay. NLRB v. Gullett Gin Co., 340 US 361, 71 S.Ct. 337, 27 LRRM 2230 (1951); Higgins v. Harden, (CA 9 1981) 644 F.2d 1348, 107 LRRM 2438; Winn Dixie Stores Inc., (CA 5 1969) 413 F.2d 1006, 71 LRRM 3003; Cal-Pacific Furniture Mfg. Co., 221 NLRB 1244, 91 LRRM 1059 (1975).

The U.S. Supreme Court in NLRB v. Seven-up Bottling Co., 244 US 344, 73 S. Ct. 287, 31 LRRM 2237 (1953), approved the method of computing back pay on a quarterly basis which was used by the NLRB in F.W. Woolworth Co., 26 LRRM 1185. The Woolworth formula safeguards the employee's status under the Social Security Act and it may result in an employee receiving back pay in some situations in which he would get none under the lump sum approach. The City argues that the application of the Woolworth formula is inapposite here because Mr.

Young would have been terminated January 5, 1979 and because he was lax in seeking employment, making the circumstances described in Woolworth inappropriate here. I have found that Mr. Young did, in fact, diligently seek employment. Further, Mr. Young's status under Social Security must be protected.

In 1977 the NLRB decided to adopt a new method of computing interest on back pay and other monetary remedies because its six percent rate adopted in Isis Plumbing & Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962), was not in line with economic conditions of the times. The method it chose was the Internal Revenue Service's adjusted prime interest rate, which is the rate charged or paid by the IRS for federal tax purposes. It is a rate fixed by the Secretary of Treasury not more than every two years to reflect money market changes. It is defined as 90 percent of the average predominant prime rate quoted by commercial banks to large businesses, rounded to the nearest full percent. Florida Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977), North Cambria Fuel Co.v. NLRB, (CA3 1981), 107 LRRM 2140. This Board has been guided by NLRB precedent in the past because of the similarity of the two statutes and should be so guided now, particularly since the rationale is sound. With the IRS adjusted prime interest rate as a basis the following computations were used to arrive at the net back pay plus interest due Mr. Young. In accordance with the Woolworth formula, what Mr. Young would have earned (gross pay), minus his interim earnings multiplied by the IRS adjusted prime rate, yields the interest due. Thus, by setting a prospective pay off date of January 1, 1983, the amount of interest due is as follows:

QTR. ENDING	COMPENSABLE HOURS	RATE PER HOUR	GROSS PAY	INTERIM EARNINGS	NET PAY
12-31-78	344	$6.675	$2,296.20	$194.70	$2,101.50
03-31-79	520	6.675	3,471.00	200.00	3,271.00
06-30-79	520	6.675	3,471.00	-	3,471.00
09-30-79	112	7.055	790.16	-	790.16
			$10,028.36	$394.70	$9,633.66

INTEREST RATE*	INTEREST DUE 1-1-83	NET BACK PAY**
50.0%	$1,050.75	$2,101.50
48.5%	1,586.44	3,271.00
47.0%	1,631.37	3,471.00
45.5%	359.53	790.16
	$4,628.09	$9,633.66

*The NLRB Regional Office in Seattle reported the following adjusted prime interest rates which it used in calculating back pay award interest in the private sector: 1979 - 6%; 1980 - 12%; 1981 - 12%; 1982 - 20%. To determine simple interest due, the NLRB totals the rates for the years in which the interest was due and owing then applies that rate (6% + 12% + 12% + 20% in this case) to the amount the employee would have earned, minus interim earnings, as of the end of the first quarter he was terminated. To arrive at interest due in subsequent quarters the first rate (50% here) is reduced by one fourth of the amount of the adjusted prime rate in effect at the time (6% x ¼ = 1.5% here).

**From these amounts the City must deduct such sums as would normally have been deducted from Mr. Young's wages for deposit with state and federal agencies on account of Social Security, PERS, and any other such deductions, and pay to such agencies to the credit of Young and the City a sum equal to the amount which, absent the discrimination, would have been deposited.

The above calculations reflect the amount due Mr. Young through December 31, 1982. Amounts due and owing beyond that time will have to be computed at the end of each succeeding quarter using the same formula, should it be necessary.

Since Mr. Young had gained seniority rights under the terms of the parties' collective bargaining agreement prior to his discharge, he must be restored to the status quo ante with respect to those rights. His seniority should be dated back to May 2, 1978. Phelps, supra, Associated Truck Lines v. NLRB, (CA6 1981), 106 LRRM 2242.

The evidence showed that Mr. Young had not signed up

for the Blue Cross insurance carried by the City for its employees. Since he chose not to be covered, no remedial order concerning insurance premiums is appropriate.

All holiday pay for public employees has been calculated into the number of compensable hours for which Mr. Young would have been entitled to be paid, therefore, no further adjustment is necessary because there is no evidence on the record showing he would have worked any of the holidays and received overtime instead of the customary day off. There is no evidence on the record to show that he would have worked any overtime at all, whether in lieu of holiday pay or beyond the regular eight hours per day or forty hours per week. To the contrary, the evidence shows he worked forty hours per week, therefore, no adjustment in back pay for potential overtime is necessary.

Had he not been discharged, Mr. Young would have continued to contribute to Social Security and to the Public Employees Retirement System at the applicable percent of his gross pay. The City would have contributed its share also. To make him whole the City should deduct from the wages due him that amount which he would have paid to the two agencies and forward the appropriate amount to each along with that amount which the City would have paid had he not been dismissed. NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (CA DC 1966), 62 LRRM 2332, Woolworth, supra.

Mr. Young would have earned vacation credits from May 2, 1978 had he remained as a City employee. Further, he would have accumulated sick leave credits at the applicable rate. He should be credited, on his personnel and payroll records, with all vacation and sick leave which he would have accumulated from May 2, 1978 less any vacation or sick leave he used or for which he was paid. In the case of sick

leave, if he was paid for one-fourth his unused credits after his discharge, he should be credited now with the remaining three-fourths for which he did not receive payment. Richard W. Kasse Co., 64 LRRM 1181 (1967), Teamsters Union v. Lancaster Transportation Co., 38 LRRM 1254 (1956).

CONCLUSION OF LAW

Bruce Young is entitled to back pay and restoration of other benefits which he would have earned but for the City's violation of his rights under title 39, chapter 31, MCA.

RECOMMENDED ORDER

IT IS ORDERED that the City of Great Falls take the following affirmative action to make Bruce Young whole:

1. Tender to him back pay in the amount of $4,626.09 as interest and $9,633.66 (minus the amounts which would have been deducted for deposit with state and federal agencies for Social Security, PERS and any other regular deductions) as earnings.

2. Deduct from the $9,633.66 and deposit with the appropriate agency all Social Security, PERS and any other amounts which would have been deducted for such purposes had he not been terminated.

3. Restore his seniority and longevity rights under the collective bargaining agreement.

4. In accordance with findings Nos. 16 and 17 herein, credit him with all vacation and sick leave which he would have accumulated since May 2, 1978, minus any such leave for which he was paid or which he used.

5. Treat him, for purposes of all other benefits, as if his employment had not been broken since May 2, 1978.

NOTICE

Exceptions to this ORDER may be filed within twenty (20) days of service thereof. If no exceptions are filed within that time, this ORDER shall become the FINAL ORDER of the Board of Personnel Appeals. Exceptions should be addressed to the Board at Capitol Station, Helena, Montana 59620.

Dated this 7th day of December, 1982.

BOARD OF PERSONNEL APPEALS

By _____
Jack H. Calhoun
Hearings Examiner

CERTIFICATE OF MAILING

I, Jennifer Jackson, hereby certify and state that on the 7th day of December, 1982, a true and correct copy of the above captioned REMEDIAL ORDER was mailed to the following:

David V. Gliko
City Attorney
City of Great Falls
P.O. Box 5021
Great Falls, MT 59403

D. Patrick McKittrick
Attorney at Law
410 Central Avenue
P.O. Box 1184
Great Falls, MT 59403

_____

BPA3:CWE

No. 81-563

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

IN THE MATTER OF UNFAIR LABOR PRACTICE:
BRUCE YOUNG, et al.,

Plaintiffs and Respondents,

vs.

CITY OF GREAT FALLS,

Defendant and Appellant.

Appeal from: District Court of the Eighth Judicial District, In and for the County of Cascade Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellant:

David V. Gliko argued, City Attorney, Great Falls, Montana

For Respondents:

Hon. Mike Greely, Attorney General, Helena, Montana
D. Patrick McKittrick argued, Great Falls, Montana
Robert Jensen, Bd. Personnel Appeals, Helana, Montana

Submitted: May 11, 1982

Decided: June 10, 1982

Filed: JUN 10 1982

Thomas J. Kearney
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The City of Great Falls (City) appeals from a judgment of the Cascade County District Court, Eighth Judicial District, affirming that part of a decision of the Board of Personnel Appeals (Board) that the City was guilty of violations of sections 39-31-401(1) and (3), MCA. The respondent cross-appeals from that part of the District Court's decision which reversed the hearings examiner's finding that the City had violated section 39-31-401(4), MCA.

The parties raise these issues:

1. Whether there was an unfair labor practice giving jurisdiction to the Board, or merely a possible breach of contract which should have been resolved under the contract's grievance procedure?

2. Whether the hearings examiner and the Board failed to apply the "but for" test?

CROSS-APPEAL

3. Whether the District Court erred by reversing the Board's finding of violation of section 39-31-401(4), MCA, stating that "any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge."

On January 10, 1979, the Construction and General Laborers' Local No. 1334, AFL-CIO (Union), on behalf of Bruce Young, filed an unfair labor practice charge with the Board of Personnel Appeals.

On October 12, 1979, the hearings examiner issued findings of fact, conclusions of law and recommended order, finding the City in violation of sections 39-31-401(1), (3), and (4). These findings were confirmed and adopted,

after review of the City's objections, by the Board's final order, issued February 21, 1980.

On March 21, 1980, the City petitioned the District Court for judicial review of the Board's final order. Pursuant to the complainant's motion, the District Court dismissed the petition for failure to name the Board as a party.

On August 20, 1981, this Court reversed the District Court's order (____ Mont. ___, 632 P.2d 1111, 38 St.Rep. 1117) holding that the Board need not be named as a party.

Thereafter, the cause was heard in the District Court, which issued the October 21, 1981 order from which this appeal and cross-appeal are taken.

Bruce Young was employed as a laborer in the Street Department of the City of Great Falls from March 20, 1977 to December 30, 1977, when he was laid off for lack of work. He was recalled on May 2, 1978, and worked until October 31, 1978, when he was laid off again.

During Young's tenure as a city employee, he filed, with the assistance of his union representative, four grievances under the collective bargaining agreement between the City and the Craft Council, of which Laborer's Union No. 1334 is a member.

The first, in May 1978, involved Young's transfer to the Water Department, while another employee with less seniority, Harold Spilde, remained with the Street Department. The grievance was resolved by Young's transfer back to the Street Department.

The second grievance arose in June 1978 when Young was sent home without pay for lack of work while Spilde again stayed. Young was subsequently compensated for four hours work.

The third occurred shortly thereafter when Spilde was placed in a permanent position over Young and Gerald Hagen. This one was resolved when Hagen, the most senior employee involved, was given the job.

The last grievance ultimately resulted in the filing of this unfair labor practice charge. Young challenged his October 31, 1978 lay-off because Spilde, with less Street Department seniority, was retained and doing laborer's work. Since Spilde was not a member of the Laborer's Union, the Union requested that he be terminated. At subsequent meetings between Union and City officials, pursuant to Step 1 of the Grievance Procedure in the Collective Bargaining Agreement, it was agreed that Spilde would not do work within the jurisdiction of the Laborer's Union.

Spilde was then transferred to the Traffic Division of the Street Department, where according to Bob Duty, Superintendent of the Department, he did laborer's work only during emergencies.

However, several Street Department employees testified that Spilde did perform "almost 100%" laborer's work until January 5, 1979. Also, his employment record classifies him as a laborer from May 1, 1978 to January 5, 1979, during which time he was paid laborer's wages.

In addition to Spilde, CETA employees with less seniority than Young continued to do laborer's work after Young's discharge. Furthermore, 7 or 8 new employees were hired by the Street Department in April 1979, but not Young. It was in this time period that Duty, apparently during a safety meeting, said in effect, "I don't care what happens. I won't hire Bruce Young back in the Street Department." In the same vein, during the resolution of Young's first grievance,

Duty told him that he had no hard feelings, "he just didn't like having some SOB telling him who he could or could not hire."

JURISDICTION

The City contends that complainants' charge does not state an unfair labor practice giving the Board jurisdiction, and that the grievance should have been resolved through the grievance procedure set out in the collective bargaining agreement.

Section 39-31-403, MCA provides that violation of section 39-31-401, MCA, the charge stated here, is an unfair labor practice remediable by the Board. At issue here is whether the Board should have deferred to the contract grievance procedure.

The District Court, in its consideration of this issue, simply stated that "[t]his Court agrees with the reasoning of the Hearings Examiner." That reasoning, with which we also agree, is reflected in the following discussion.

Because of the similarity between Montana's Collective Bargaining Act for Public Employees (Title 39, Chapter 31, MCA) and the National Labor Relations Act, it is helpful to consider federal precedent on this issue.

A "prearbitral deferral policy" was first enunciated by the NLRB in Collyer Insulated Wire (1971), 192 NLRB 837, 77 LRRM 1931. There, quoting from Jos. Schlitz Brewing Co. (1968), 175 NLRB 23, 70 LRRM 1472, 1475, the NLRB found "that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established." Collyer at 77 LRRM 1936.

It went on to note several circumstances in that case which "no less than those in Schlitz, weigh heavily in favor of deferral." The dispute arose within the confines of a long and productive collective bargaining relationship. No claim of enmity was made. Respondent had credibly asserted its willingness to arbitrate under a clause providing for arbitration in a broad range of disputes. The contract and its meaning lay at the center of the dispute. The contract obligated each party to submit to arbitration and bound them to the result. Collyer at 77 LRRM 1936-37.

We can distinguish Collyer on these factors alone. The Board's findings, with respect to questions of fact which are supported by substantial evidence and are therefore conclusive (section 39-31-409(4), MCA) show that the City's conduct "does not lead one to believe that a stable collective bargaining relationship exists between the parties," that "[T]here was no indication of a willingness on the part of the City to arbitrate," and that the "grievance procedure provided in the contract does not culminate in a final and binding decision. It may end in a 'binding' decision, if a majority of a six-member committee formed by the city manager and comprised of three city and three union representatives can reach agreement."

It should be noted here that the City's reliance on section 39-31-310, MCA is misplaced. It claims that the section is a legislative mandate that public employers are not bound to go to final and binding arbitration, thereby nullifying any contrary NLRB ruling. In fact, the section is permissive, not mandatory. It merely allows the parties to agree voluntarily to submit any or all issues to final and binding arbitration. No such agreement was made here,

nor does the contract require it, which as we have stated, is one basis for not deferring in this case.

Furthermore, the NLRB in General American Trans. Corp. (1977), 228 NLRB 808, 94 LRRM 1483, held ~~that~~ the Collyer doctrine is not applicable in cases involving alleged interference with protected rights or employment discrimination intended to encourage or discourage the free exercise of those rights. See sections 8(a)(1) and (3), NLRA and sections 39-31-401(1) and (3), MCA. The charge here involves such alleged violations. Deferral is inappropriate in this case.

UNFAIR LABOR PRACTICES

Regarding the charges themselves, the District Court concluded "that there is substantial evidence on the record considered as a whole to support the findings and conclusions of the Board with regard to the violations of Section 39-31-401(1) and (3)." Again we agree. Without wading through the wealth of available precedent propounded by the hearings examiner, we will simply restate his determinative findings.

As to section 39-31-401(1), MCA, the examiner found "that the fact that Mr. Young had a record of filing grievances affected the judgment of those city officials responsible for laying him off and keeping a person with less seniority on the payroll as a laborer." Motive is not the critical element in this violation.

As to section 39-31-401(3), the examiner found that "[T]he evidence clearly points to the conclusion that the City's discriminatory motive was a factor, and probably the dominate (sic) factor, in its decision to lay off complainant and thereby violate the agreement. Its actions caused unrest among union members and had the effect of discouraging membership."

"BUT FOR" TEST

The City relies here on Western Exterminator Co. v. N.L.R.B. (9th Cir. 1977), 565 F.2d 1114, which states the rule that where a discharge is motivated by both a legitimate business consideration and protected union activity, the test is whether the business reason or the protected union activity is the moving cause behind the discharge. 565 F.2d at 1116. This Court adopted essentially the same test in Board of Trustees of Billings, etc. v. State (1979), ___ Mont. ___, 604 P.2d 770, 777, 36 St.Rep. 2289, 2299.

In this case, although the "but for" test was not utilized by the hearings examiner, he did find, again, "that the City's discriminatory motive was a factor, and probably the dominant (sic) factor, in its decision to lay off complainant." The record amply demonstrates that protected union activity was the moving cause behind the discharge.

CROSS-APPEAL

Section 39-31-401(4) makes it an unfair labor practice for an employer to:

> "(4) discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; . . ."

The Board found there was a violation "after he (Young) filed this unfair labor practice charge because he was not called back by the city."

The District Court reversed because "any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge, not afterward."

Respondents do not contend that filing a grievance is equivalent to signing or filing an affidavit, petition, or complaint. Instead, they point to two statutes:

"39-31-407. Amendment of complaint. Any complaint may be amended by the complainant at any time prior to the issuance of an order based thereon, provided that the charged party is not unfairly prejudiced thereby."

"39-31-408. Modification by board of findings and order. Until the record in a proceeding has been filed in district court, the board at any time, upon reasonable notice and in such manner as it considers proper, may modify or set aside, in whole or in part, any finding or order made or issued by it."

We agree that Young was discriminated against after this charge was filed. Since he could have amended his complaint to include that discrimination had it not already been part of his original complaint, and since the City could therefore not possibly have been prejudiced thereby, we reverse the District Court on this point and grant the cross-appeal. The order of the Board is reinstated.

Affirmed in part, reversed in part.

John C. Sheehy
Justice

We Concur:

Frank B. Haswell
Chief Justice

John Conway Harrison

Frank I. Haswell Jr.

Justices

No. 80-367

IN THE SUPREME COURT OF THE STATE OF MONTANA

1981

IN THE MATTER OF UNFAIR LABOR PRACTICE:
BRUCE YOUNG BY CONSTRUCTION AND GENERAL
LABORERS' LOCAL NO. 1334 AFL-CIO,

Respondent and Complainant,

vs.

CITY OF GREAT FALLS,

Plaintiff and Appellant.

Appeal from: District Court of the Eighth Judicial District,
In and for the County of Cascade,
Honorable Joel C. Roth, Judge presiding.

Counsel of Record:

For Appellant:

David V. Gliko, City Attorney, argued, Great Falls, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
James Gardner, Bd. Personnel Appeals, Helena, Montana
D. Patrick McKittrick argued, Great Falls, Montana

Submitted: June 18, 1981

Decided: August 20, 1981

Filed: AUG 20 1981

Thomas J. Kearney
Clerk

Mr. Justice Frank B. Morrison, Jr., delivered the Opinion of the Court.

This appeal follows an order and judgment of the Eighth Judicial District, Cascade County, denying a motion to amend and dismissing appellant's petition for judicial review of a decision and order of the State Board of Personnel Appeals.

On January 10, 1979, respondent, Construction and General Laborers' Union Local No. 1334, AFL-CIO, filed an unfair labor practice charge with the Montana State Board of Personnel Appeals. This charge was filed on behalf of Bruce Young against appellant, City of Great Falls. Appellant answered and denied the charge, whereupon a hearing was held by an examiner for the Board. Following the hearing, the examiner on October 12, 1979, issued findings of fact, conclusions of law and a recommended order, confirming in part the unfair labor practice charge.

Appellant filed exceptions and objections to the decision rendered by the hearings examiner. A review hearing was then held and the Board of Personnel Appeals confirmed the recommended order. A final order was issued by the Board on February 21, 1980.

On March 21, 1980, appellant petitioned the District Court for judicial review of the final order. Service of the petition and a summons was acknowledged by Young, the attorney general of the State of Montana and the Board of Personnel Appeals. Appellant, however, did not include the Board as a named party on the petition.

Respondent, on April 21, 1980, moved to dismiss the petition for the reason that appellant failed to name the Board as a party within the 30-day limitation provided for in section 2-4-702, MCA. On April 30, 1980, appellant moved to amend its petition to add the Board as a party. A

hearing on the matter was held in the District Court on July 24, 1980. On July 29, 1980, the court issued a memorandum decision and order, denying appellant's motion to amend the petition and granting respondent's motion to dismiss. Judgment was so entered, and the City of Great Falls now appeals.

The sole issue on appeal is whether the State Board of Personnel Appeals is required to be designated as a party on a petition for judicial review. We hold that the State Board of Personnel Appeals is not required to be made a party.

Section 2-4-702, MCA, governs judicial review proceedings under the Administrative Procedure Act, including review of decisions by the Board of Personnel Appeals. That statute, in part, provides as follows:

> "(2)(a) Proceedings for review shall be instituted by filing a petition in district court within 30 days after service of the final decision of the agency or, if a hearing is requested, within 30 days after the decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record."

The only basis for dismissing this petition for judicial review is the claim by respondent that the Board is an indispensable party within the purview of Rule 19, M.R.Civ.P. In pertinent part, Rule 19 provides:

> "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest: . . ."

There is some support for the proposition that an administrative agency must be joined under Rule 19, M.R.Civ.P. See Smith v. County of El Paso (1979), 42 Colo.App. 316, 593 P.2d 979; Civil Serv. Com'n of C. & C. of Denver v. District Court (1974), 186 Colo. 308, 527 P.2d 531.

We believe that Rule 19, M.R.Civ.P., does not, by its terms, contemplate inclusion of an administrative board as an indispensable party for purposes of judicial review. Where the legislature has intended for administrative bodies to be made parties, they have specifically so provided. For example, section 39-51-2410, MCA, providing for judicial review of a decision by the Board of Labor Appeals, provides that the Employment Security Division shall be deemed to be a party in any action for judicial review. Yet when the legislature enacted 2-4-702, MCA, no provision was made for naming the "board" as a party for purposes of review.

Our court encourages a liberal interpretation of procedural rules governing judicial review of an administrative board. F.W. Woolworth Co., Inc. v. Employment Sec. Div. (1981), ___ Mont.___, 627 P.2d 851, 38 St.Rep. 694. Justice is best served by avoiding an over-technical approach and allowing the parties to have their day in court.

We hold that the Board of Personnel Appeals need not be a party to proceedings for judicial review. Accordingly, the District Court order and judgment is reversed, and the case remanded for proceedings in accordance with this opinion.

Justice

We concur:

Chief Justice

John Cornelius Hotchkiss

Daniel J. Shea

Justices

Mr. Justice Gene B. Daly dissenting:

We dissent.

It is true the statute does not specify whether the agency is required to be named as a party in the petition for review and does not appear to make the agency's joinder mandatory or jurisdictional in nature. A thirty-day limitation on filing a petition for judicial review, however, has been interpreted to mean that any challenge to the agency action must be perfected within the required thirty days. Perfection in this regard must include the correct joinder of all parties required to be joined under Rule 19, R.R.Civ.P. See Smith v. County of El Paso (1979), 42 Colo.App. 316, 593 P.2d 979; Civil Service Commission v. District Court (1974), 186 Colo. 308, 527 P.2d 531. (It should be pointed out that Colorado has not adopted the Administrative Procedure Act but provided for a judicial review of agency action in its rules of civil procedure, Rule 106, C.R.C.P., under which the above-cited cases were decided.)

If this interpretation is accepted by the Court, then a proper joinder of those individuals or agencies deemed to be essential or indispensable parties to the petition, under Rule 19, R.R.Civ.P., must be considered a jurisdictional requirement to be satisfied if dismissal is to be avoided.

Rule 19, R.R.Civ.P., provides in pertinent part:

> "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."

Here, appellant is attempting to challenge a decision and order of the Board of Personnel Appeals, issued in furtherance of its duty as a quasi-judicial body to administer the public policy of this State as set forth in Title 39, Chap. 31, MCA (Collective-Bargaining for Public Employees). In functioning to promote and advance this public policy, the Board has a definite interest in the petition to review and, as a practical matter, must be joined to insure a complete and just adjudication of that interest.

The majority, of course, disagrees with this conclusion and asserts that the Board is, by some liberal interpretation, excluded from their review hearing in court and that "justice is best served by avoiding an over-technical approach and allowing the parties to have their day in court." We do not understand how you give parties their day in court by excluding them. I suppose it depends on whose ox is being gored.

What the majority fails to realize, however, is that in this case a joinder of all essential parties within the thirty-day limitation period is a jurisdictional requirement. As a consequence of its juridictional nature, if a party is deemed essential or necessary to the proceeding, that party automatically becomes indispensable. This in no way depends on a liberal construction or other self-serving jingoisms relied upon by the majority.

Those essential jurisdictional requirements necessary to perfect a petition for review must be satisfied to vest authority in the reviewing or appellate tribunal. A failure to satisfy these requirements thus leaves the court with no adjudicatory or reviewing power; no jurisdiction to act; and

no discretion to remedy or waive the jurisdictional defects.

Here, appellant appears to have failed to vest the District Court with jurisdiction to consider the petition for review. If this is the case, then the court was unable to entertain appellant's motion to amend and was left with no alternative but to dismiss the action.

We would affirm the judgment of the District Court.

Gene B. Daly
Justice

We concur in the foregoing dissent:

Frank I. Haswell
Chief Justice

John C. Sheehy
Justice

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

IN THE MATTER OF UNFAIR LABOR PRACTICE: BRUCE YOUNG BY CONSTRUCTION AND GENERAL LABORERS' LOCAL NO. 1334, AFL-CIO, Complainant, vs CITY OF GREAT FALLS, Defendant.	CAUSE NO. ADV-80-304c MEMORANDUM DECISION AND ORDER

The Defendant's Petition for Judicial Review was heard on October 21, 1981. The Defendant was represented by its attorney, Mr. David V. Gliko, and the Complainant was represented by his attorney, Mr. D. Patrick McKittrick.

Briefs in Support of said Petition and in opposition thereto had been filed by both counsel before the hearing.

Oral argument was presented by each attorney. The Court then took the matter under advisement and now enters the following Memorandum Decision and Order.

MEMORANDUM DECISION

This case involves Bruce Young (Young), the Construction and General Laborers' Local #1334, AFL-CIO (Union), the City of Great Falls (City), and the Board of Personnel Appeals (Board).

After Young was laid off by the City on October 31, 1978, Young's Union filed an Unfair Labor Practice Charge with the Board on January 18, 1979. That filing culminated in a hearing in May 1979, before a Hearings Examiner, his decision dated October 12, 1979, and a Final Order by the Board dated February 21, 1980. The Board found unfair labor practices committed by

the City, ordered reinstatement of Young plus payment of back wages, benefits and interest.

On March 21, 1986, the City filed herein its Petition for Judicial Review of the Final Order of the Board. Young's attorney filed a Motion to Dismiss the Petition for the reason that the City had failed to join an indispensible party, i.e., the Board. This Court granted the Motion and an appeal to the Montana Supreme Court followed, resulting in a reversal of the Order dismissing the Petition, and remanding the case to this Court for a review of the Petition. (Montana Supreme Court Decision #86-367 decided August 20, 1987.)

Section 39-31-401 thru 409 MCA are the relevant statutory provisions to this proceeding. Those sections define an unfair labor practice, grant the Board jurisdiction to remedy violations, set forth the procedure for hearing charges of unfair labor practices, and describe court enforcement and review of the Board's Order.

The unfair labor practice charges filed with the Board by the Union alleged that the City committed a violation of each of the five subsections of Section 39-31-401 MCA. The Hearings Examiner found and concluded that the alleged violations of subsections (2) and (5) were not proven. However, he found that the City had committed an unfair labor practice under subsections (1), (3) and (4). Hence, reinstatement of Young was ordered along with payment of his back wages, benefits, and interest since the date he was laid off on October 31, 1978.

The City challenges the jurisdiction of the Board at the outset, contending that Young's seniority status or lack thereof is governed by the terms of the Collective Bargaining Agreement between the Union and the City and if Young has a complaint it should involve a question of contract interpretation to be litigated by Young and the Union and the City in District Court.

The City contends that the circumstances of this case do not fit within any of the unfair labor practices detailed in Section 39-31-401 MCA and therefore the Board has no jurisdiction and the Final Order of the Board must be reversed and the entire matter dismissed.

In reviewing the transcript of the Board's Hearing this Court notes that page 6 of the Collective Bargaining Agreement (an exhibit admitted into evidence at the Hearing) is missing.

The jurisdiction issue, always a crucial issue in any legal proceeding, was addressed by the Hearings Examiner in his Findings, Conclusions and Recommended Order beginning at page 5 thereof. The Examiner concluded that the Board did have jurisdiction and that the Board would not defer to the grievance procedure established in the Collective Bargaining Agreement because there was alleged employer discrimination or interference with an employee's protected rights and the grievance procedure did not terminate with binding arbitration. This Court agrees with the reasoning of the Hearings Examiner and additionally holds that because an employee may have recourse to a district court as a possible choice of forum to file his claim (possibly a declaratory judgment action) does not foreclose him from filing an unfair labor practice charge with the Board if he can assert a statutory violation under Section 39-31-401 MCA.

The City's attorney also challenges each finding of an unfair labor practice, i.e., subsections (1), (3), and (4) by the Hearings Examiner. This Court has reviewed the transcript, considered the Petition and the Briefs in support of and in opposition thereto, and concludes that there is substantial evidence on the record considered as a whole to support the findings and conclusions of the Board with regard to the violations of Section 39-31-401 (1) and (3).

However, this Court disagrees with the findings of a violation

of 39-31-401(4). Subsection (4) refers to a public employer discharging an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under the statute. The Hearings Examiner admits that an employee's filing of a grievance pursuant to the provisions of a grievance procedure contained in a Collective Bargaining Agreement is not included within the definition of filing an affidavit, petition, or complaint under Subsection (4). The Hearings Examiner goes on to reason that the City has violated subsection (4) because the City refused to rehire Young after he filed his unfair labor practice charge with the Board. This Court concludes that any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge, not afterward. Therefore, this Court concludes that the Board's findings of a violation of 39-31-401(4) by the City must be reversed.

This Court agrees with the Final Order's ruling that the alleged violations under 39-31-401(2) and (5) were not proven.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Board's Final Order dated February 21, 1980 is affirmed except as to that part finding a violation of Section 39-31-401(4), which is reversed.

DATED this 26th day of October, 1981.

DISTRICT JUDGE

cc: David V. Gliko
D. Patrick McKittrick
Board of Personnal Appeals
Mike Greely

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

IN THE MATTER OF UNFAIR LABOR PRACTICE:	
BRUCE YOUNG BY CONSTRUCTION AND GENERAL LABORERS' LOCAL NO. 1334, AFL-CIO,	
Complainant.	No. ADV-80-304
vs	MEMORANDUM DECISION AND ORDER
CITY OF GREAT FALLS,	
Defendant.	

The Complainant's Motion to Dismiss the City's Petition for Judicial Review herein was heard on July 24, 1980. The Complainant was represented by attorney, Mr. D. Patrick McKittrick and the Defendant was represented by attorney, Mr. David V. Gliko.

Oral argument was presented by both counsel. Briefs in support of and in opposition to said Motion to Dismiss had been filed prior to the hearing.

The Court, having considered the Petition, Motion, the briefs, and the oral arguments, now enters the following Memorandum Decision and Order.

MEMORANDUM DECISION

The City of Great Falls filed its Petition for Judicial Review of a final decision issued on February 27, 1980, by the Board of Personnel Appeals, a board allocated to the Department of Labor and Industry of the State of Montana. Section 2-15-1705 MCA.

Section 2-4-702 MCA governs the procedure for initiating judicial review of a final administrative agency decision.

Generally, a petition must be filed within 30 days after service of the final decision in the district court where the petitioner resides and copies of the petition shall be promptly served upon the agency and all parties of record. All those requirements were satisfied herein.

It is crucial to this decision to note that the statute 2-4-702 MCA does not specify what persons or agencies should be named as parties in the Petition.

The Complainant's position is that the Board of Personnel Appeals is an indispensable party to the judicial review proceeding and because it was not so named, the attempted judicial review was not properly perfected within the limited 30 day time period and hence the district court is without jurisdiction to review the matter and the Petition must be dismissed.

On the other hand, the City of Great Falls contends that the Board of Personnel Appeals is not an indispensable party, that said Board was promptly served with process, that it is clear from the allegations contained in the Petition that it is the Board's final decision dated February 21, 1980 that is being appealed, and hence the District Court has jurisdiction of the Petition and the Board.

The private persons who were parties in the administrative agency proceeding are also parties in the instant review proceeding and there is no problem as to them. However, should the Board of Personnel Appeals of the Department of Labor and Industry be a party to the judicial review proceeding? This Court concludes that said Board is a necessary party and the failure to name the Board as a party in the Petition constitutes a fatal defect in the perfection of the review proceeding, ousts this Court of jurisdiction herein, and subjects the Petiton to dismissal.

The conclusion of this Court is partly based upon statements

contained in 2 Am Jur 2nd, Administrative Law, 641, which provides in part:

> "Where relief or review of action of an administrative agency is sought in Court, the absence of a necessary party may preclude the granting of relief. Who are necessary or proper parties in a proceeding to review agency action is largely determined by statutes governing the particular agency, the nature of its powers, and the effect of the exercise of such powers . . . ."
>
> "The administrative agency whose action is sought to be reviewed may be, and normally is, a necessary, proper, and sufficient party. In particular it has been held that the action of an administrator may not be challenged except in a proceeding to which he is a party . . . ."

To further buttress this Court's decision herein, attention is directed to "Handbook of Administrative Procedure" by Roger Tippy, at page 105 thereof wherein a sample petition for judicial review is set forth. Said sample petition denominates the party seeking the review as the "Petitioner", and clearly indicates the administrative agency and the successful party in the administrative proceeding as the 'Respondents'.

The failure to join the Board of Personnel Appeals as a party in the Petition for Judicial Review subjects the Petition to dismissal and the fact that said non-party Board was served with process herein does not make the Board a party when the Board was not named as a party Respondent.

The City's Motion to Amend the Petition to add the Board of Personnel Appeals as a party, which was filed on April 30,

1980, comes too late because the Petition which must name the necessary parties, must be filed within 30 days after service of the agencies' final decision, and April 30, 1980 is beyond said 30 day period which expired near the end of March.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Respondent's [Labeled Complainant herein] Motion to Dismiss the Petition for Judicial Review is granted.

DATED this 29th day of July, 1980.

DISTRICT JUDGE

cc: D. Patrick McKittrick
David V. Gerke
Mike Greely
Board of Personnel Appeals

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 1-79:

BRUCE YOUNG by CONSTRUCTION AND GENERAL LABORERS' LOCAL NO. 1334, AFL-CIO,

Complainant,

- vs -

CITY OF GREAT FALLS,

Defendant.

FINAL ORDER

* *

The Findings of Fact, Concusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun, on October 12, 1979.

Exceptions and Objections to Findings of Fact, Conclusions of Law and Recommended Order were filed by David V. Gliko, Great Falls City Attorney, on behalf of the Defendant, on October 31, 1979.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the exceptions of Defendant to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order as the Final Order of this Board.

DATED this 27th day of February, 1980.

BOARD OF PERSONNEL APPEALS

By _____
Brent Cromley
Chairman

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79: BRUCE YOUNG by CONSTRUCTION AND GENERAL LABORERS' LOCAL NO. 1334, ALF-CIO, Complainant, vs. CITY OF GREAT FALLS, Defendant.	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

* *

On January 10, 1979, Complainant filed unfair labor practice charges against Defendant alleging that the City had violated: (1) 39-31-401(1) MCA by laying off Bruce Young and keeping a person with less seniority on and because of Mr. Young's union activities; (2) 39-31-401(5) MCA by failing to abide by a settlement of a grievance filed by Mr. Young; (3) 39-31-401(2) MCA by interfering with the administration of the union; (4) 39-31-401(1) MCA by discouraging union membership; and (5) 39-31-401(4) MCA by discharging Mr. Young. These charges were identified at a pre-hearing conference held on March 21, 1979. A formal hearing, under authority of 39-31-405 MCA, was conducted on May 15, 1979. Mr. D. Patrick McKittrick represented complainant; Mr. David V. Gliko represented defendant.

I. ISSUES

1. Whether the Board of Personnel Appeals has jurisdiction over this matter.

2. If the Board has jurisdiction, should it defer to the grievance procedure which exists in the contract between the Union and City?

3. If the Board has jurisdiction and does not defer to the contract grievance procedure, did the City commit, by its actions which affected Mr. Young's employment, a violation of 39-31-401 MCA?

Based on the substantial evidence on the record including sworn testimony of witnesses, I find as follows.

II. FINDINGS OF FACT

1. Bruce Young was employed in the Street Department as a laborer by the City of Great Falls from March 20, 1977, to December 30, 1977. He was laid off until May 2, 1978, at which time he was recalled and worked until October 31, 1978. He was laid off again and, as of the date this matter was heard, had not been recalled. He was not laid off for disciplinary reasons.

2. During Mr. Young's tenure as a city employee, he filed, with the assistance of a union official, four grievances under the collective bargaining agreement between the Craft Council and the City. The first was filed when he was assigned to the Water Department while another employee, Harold Spilde, whom he contended had less seniority in the Street Department than he, remained in the Street Department. The grievance was resolved upon Complainant's transfer back to the Street Department. The second grievance arose over Mr. Young being sent home for lack of work without pay while the other employee, Harold Spilde, stayed. The grievance was resolved when the City paid Complainant for four hours. Mr. Young filed a third grievance when Harold Spilde was placed in a permanent position over both Complainant and Gerald Hagen. Mr. Spilde was removed from the position and replaced with Hagen. The fourth grievance filed by Bruce Young ultimately resulted in the filing of this unfair labor practice charge. In his grievance, he contended that he was laid off at the end of October, 1978, for lack of work when Harold Spilde, whom he contended had less seniority in the Street Department than he, was kept on and was doing laborer's work.

3. The Union notified defendant to terminate Mr. Spilde because they believed he was doing laborer's work. Mr. Spilde was not a member of the laborer's union. At a subsequent meeting

between Union and City officials, it was agreed that Spilde would not do laborer's work. The Union believed later that he was still performing laborer's work and set up a grievance meeting with City representatives who stated that Spilde would not do laborer's work.

4. Mr. Bob Duty is the superintendent of the Street Department which includes the Traffic Division. He testified that Young was laid off for lack of work, not disciplinary reasons; that Spilde worked as a laborer and engineering technician from May, 1978, to January 5, 1976; that he (Spilde) was transferred to the Traffic Division after October, 1978; that he did labor work during emergencies.

5. Several employees of the Street Department observed Harold Spilde performing laborer work after October, 1978, until January 5, 1979. His employment record, Complainant's Exhibit No. 2, shows him as a laborer from May 1, 1978, to January 5, 1979; prior to that, he was shown as an Engineering Tech. 1 and Junior Engineer.

6. Mr. Duty stated to employees of the Street Department that he would not hire Bruce Young back in the Department.

7. Mr. Young had gained seniority rights under terms of the collective bargaining agreement during 1977. Article XII of that agreement provides that "...Seniority means the rights secured by permanent full-time employees by length of continuous service to the city. Seniority rights shall apply to layoffs, scheduling of vacation, and transfer of employees; that is, the last employee hired shall be the first laid off. Seniority shall not be effective until a ninety (90) day probationary period has been completed, after which seniority shall date back to the date of last hiring. Seniority shall be determined by craft and division. Recall rights are not earned until after six (6) months continous [sic] service."

8. The grievance procedure provided for under terms of the collective bargaining agreement between the Craft Council and the City does not require final and binding arbitration. Instead, it provides that, if both parties cannot agree to submit to binding arbitration, either party may take legal or economic action.

9. The City agreed that Harold Spilde would not perform laborer's work as part of the settlement of a grievance which had been filed by the Complainant and Union. The Union believed the matter was resolved.

10. Bruce Young had more seniority as a laborer in the Street Department as of October 31, 1978, than did Harold Spilde; and he was to have been the first to be recalled if anyone was recalled in the Street Department.

12. Persons are employed by the City Street Department as laborers under the Comprehensive Employment and Training Act and perform some of the duties which a regular laborer would be expected to perform.

13. Article IV, 4.1 of the parties' collective bargaining agreement provides, in part, "Employees who are members of the union on the date of [sic] this AGREEMENT is executed shall, as a condition of continuing employment, maintain their membership in the union. All future employees performing work with the jurisdiction of the union involved shall, as a condition of continuing employment, become members of such union within thirty (30) days of the date of their employment and the union agrees that such employees shall have thirty-one (31) days within which to pay union's initiation fees and dues. If the employees fail to pay initiation fees or dues within thirty-one (31) days or fails to affectuate [sic] the provisions of Section 59-1603(5) of the Montana Statutes, the union may request in writing that the employee be discharged. The city agrees to discharge said employee upon written request from the union..."

14. Mr. Spilde was not a member of nor did he pay dues to the Laborer's Union during the period of time pertinent here. The City did not terminate him upon request by the Union.

15. Mr. Pottratz, Assistant Business Manager for the Union, talked with a number of the bargaining unit members who were also members of the Union. He surmised that union membership was being discouraged by the City's action regarding Young and Spilde

III. OPINION

The jurisdiction of the Board of Personnel Appeals on unfair labor practice charges is set forth in 39-31-403 et seq. MCA. A reading of those sections can only lead to the conclusion that jurisdiction in this matter does lie with this Board. Whether this is a matter which should be deferred to the contract grievance procedure is a question which must be examined in greater detail.

Because of the similarity between Montana's Collective Bargaining Act for Public Employees and the National Labor Relations Act, this Board has usually been guided by precedent set by its equivalent at the federal level - the National Labor Relation Board. It is especially helpful to consider such precedent when deciding issues which have not been addressed by this Board.

The NLRB adopted a prearbitral deferral policy in 1971, Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971). There the NLRB stated, in part, that, "The courts have long recognized that an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function." Hence, the national policy to refrain from determining disputes which could be both unfair labor practice charges

and alledged contract violations.

Generally, the holding in Collyer established the following factors to determine whether deferral is appropriate: (1) the dispute must arise within the confines of a stable collective bargaining relationship, without any assertion of enmity by the respondent toward the charging party; (2) the respondent must be willing to arbitrate the issue under a clause providing for arbitration in a broad range of disputes, and (3) the contract and its meaning lie at the center of the dispute. Where the respondent's conduct has been a complete rejection of the principles of collective bargaining and the organizational rights of employees, the NLRB has not deferred, Capitol Roof & Supply Co., 217 NLRB 173, 89 LRRM 1191 (1975). Certain alleged conduct alone has been so flagrant as to prevent the NLRB from deferring to prospective arbitration regardless of the parties' previous collective bargaining relationships, e.g., the NLRB will not defer where the unfair labor practice charge alleges that the employer's conduct was in retaliation or reprisal for an employee's resort to the grievance procedure, North Shore Publishing Co., 206 NLRB 42, 84 LRRM 1165 (1973). If no final and binding grievance procedure exists, the NLRB will not defer, Wheeler Const. Co., 219 NLRB 104, 90 LRRM 1173 (1975); Tulsa Whisenhunt Funeral Homes, 195 NLRB 106, 79 LRRM 1265 (1972); Atlas Tack Corp. 226 NLRB 38, 93 LRRM 1236 (1976).

In 1977, the NLRB altered its prearbitral deferral policy as enunciated in Collyer. In General American Transportation Corp., 228 NLRB 102, 94 LRRM 1483 (1977), the Board held that deferral was no longer appropriate in cases of alleged employer discrimination or interference with protected rights.

In the instant case, I believe the Board of Personnel Appeal should follow NLRB precedent on deferral and not defer this charge to the contract grievance procedure. The grievance proce-

dure provided in the contract does not culminate in a final and binding decision. It may end in a "binding" decision, if a majority of a six-member committee formed by the city manager and comprised of three city and three union representatives can reach agreement. This charge also involves an alleged violation of complainant's basic rights under 39-31-401(1) MCA and should not, for that further reason, be deferred. The City's conduct with respect to abiding by the settlement reached on the grievance filed by Mr. Young does not lead one to conclude that a stable collective bargaining relationship exists between the parties. There was no indication of a willingness on the part of the City to arbitrate.

Section 39-31-401(3) MCA prohibits discrimination by a public employer "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This is the same prohibition written into Section 8(a)(3) of the National Labor Relations Act. In Radio Officers' Union v. NLRB, 347US17, 33 LRRM 2417 (1954) the U.S. Supreme Court stated:

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed ... But it is also clear that specific evidence of intent to encourage or discourage is not an indispensible element of proof of violation of 8(a)(3) ... An employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.

Discriminatory conduct motivated by union animus and having the foreseeable effect of either encouraging or discouraging union membership must be held to be violative of public employee rights under 39-31-401(3) MCA. I must conclude here that Mr. Young was

laid off and Mr. Spilde retained by the City because Young had filed a number of grievances. Had the City followed the seniorit clause of the agreement and laid off Spilde first or had it placed Spilde in a true non-bargaining unit position doing non-bargaining unit work, one would be inclined to believe no union animus existed. However, Young was laid off, Spilde remained (with less seniority as a laborer) and did laborer work, the supervisor stated publicly that he would not rehire complainant, the City had CETA employees doing laborer work, and Young has not yet been recalled. The evidence clearly points to the conclusior that the City's discriminatory motive was a factor, and probably the dominate factor, in its decision to lay off complainant and thereby violate the agreement. Its actions caused unrest among union members and had the effect of discouraging membership.

Complainant also charged a violation of 39-31-401(4) MCA which prohibits employer discrimination against an employee for signing or filing an affidavit, petition or complaint or giving information, or testifying under the act. The same prohibition is found in Section 8(a)(4) of the NLRA. The narrow scope of this unfair labor practice should be noted. Filing a grievance under the terms of a contract grievance procedure does not equate to signing or filing an affidavit, petition, or complaint under the act. However, Mr. Young was discriminated against (for aggrieving a number of employer personnel actions) when he was laid off and a person with less seniority kept on doing laborer work. And, in my view, he was further discriminated against after he filed this unfair labor practice charge because he was not called back by the city. The evidence shows that laborer-type work was being done by CETA personnel and by Mr. Spilde. Mr. Young and his union added fuel to the already existing discriminatory flame by charging the City with unfair labor practice under Montana law.

Section 39-31-401(2) MCA makes it an unfair labor practice for a public employer to dominate, interfere, or assist in the formation or administration of any labor organization. I believe the purpose of this provision is to insure that a union which purports to represent employees in collective bargaining will not be subjected to employer control. There is no evidence on the record to indicate that the City dominated, interfered, or assisted in the administration of the Union. The type of activity set out in paragraph (4) of this section goes beyond interferring with the rights of individual employees as guaranteed by paragraph (1); it goes to those activities which are aimed at the labor organization as an entity.

The city was also charged with a violation of 39-31-401(5) MCA for refusing to bargain collectively in good faith with an exclusive representative. This would be an 8(a)(5) charge under the NLRA. The U.S. Supreme Court held, in Conley v. Gibson 355US41, 46, 41 LRRM 2089 (1957), that collective bargaining is a continuing process. Clearly, it is not limited to the negotiation of an agreement under which the parties intend to operate. In many cases, bargaining can and must be carried on during the term of an agreement. However, the duty to bargain during the term of the agreement has generally been limited to subjects which were neither discussed nor incorporated into the contract. A waiver of bargaining rights may occur by reason of the express agreement of the parties. The contract between the city and the union contains a seniority clause which deals specifically with the rights of employees relative to lay offs, recalls, etc. Since the contract provides for such, I cannot find any obligation by the city to bargain on the subject. But, bargaining is not the problem in the instant case; the parties did that prior to entering into the agreement. The problem is one of enforcement of contractual and statutory rights. Therefore, I must

conclude that there was no refusal to bargain because there was no obligation to bargain on the subject.

Section 39-31-401(1) MCA makes it an unfair labor practice for a public employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in 39-31-201 MCA. That section states, "Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protectio free from interference, restraint, or coercion." The NLRA sets forth the same prohibition on the national level. In Cooper Thermometer Co., 154 NLRB 502, 59 LRRM 1767 (1965) the NLRB held that motive is not the critical element in a section 8(a)(1) violation, that "interference, restraint, and coercion under Section 8(a)(1) of the act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the act." The NLRB has generally held that discharging or disciplining employees for filing or processing grievances is a violation of Section 8(a)(1), Ernst Steel Corp., 212 NLRB 32, 87 LRRM 1508 (1974); Seven-Up Bottling Co. of Detroi 223 NLRB 136, 92 LRRM 1001 (1976). I find here that the fact that Mr. Young had a record of filing grievances affected the judgment of those city officials responsible for laying him off and keeping a person with less seniority on the payroll as a laborer. The City's action in employing CETA personnel to perform laborer work and not recall Mr. Young is a further indication of its disregard for his statutory and contractual rights.

Whether they (City officials) intended such interference is not known; however, that is not the test which I believe should be adopted by the Board of Personnel Appeals. The BPA should adopt the same rule, with respect to 39-31-401(1) MCA violations as has been adopted by the NLRB as noted above.

IV. CONCLUSION OF LAW

The Board of Personnel Appeals has jurisdiction under 39-31-403 MCA.

The defendent, City of Great Falls, violated 39-31-401(1)(3) and (4); it did not violate 39-31-401(2) or (5).

V. RECOMMENDED ORDER

IT IS ORDERED THAT, after this Order becomes final, the City of Great Falls, its officer, agents, and representatives shall:

(1) Cease and desist from its violations of 39-31-401 MCA;

(2) Take affirmative action by rainstating Bruce Young as a laborer with the city;

(3) Make Bruce Young whole by repaying him for lost wages, benefits, and interest incurred since October 31, 1978;

(4) Meet with representatives of the Union and attempt to determine the amount due under No. 3 above; if a mutual determination cannot be made within ten days, notify the Board of Personnel Appeals' hearing examiner who will hold a hearing and issue a detailed remedial order;

5. Post in conspicuous places in its major place of business and appropriate work stations copies of the attached notice marked "Appendix."

6. Notify the Board of Personnel Appeals in writing within 20 days what steps have been taken to comply with this Order.

The Union shall not be reimbursed for legal or other expense incurred as a result of bringing these charges.

NOTICE

Exceptions may be filed to these Findings of Fact, Conclu-

sions of Law, and Recommended Order within 20 days of service thereof. If no exceptions are filed with the Board within that time, the Recommenced Order shall become the Final Order of the Board. Exceptions shall be addressed to the Board of Personnel Appeals, Box 202, Capitol Station, Helena, Montana, 59601.

DATED this 12th day of ~~September~~ October, 1979.

BOARD OF PERSONNEL APPEALS

By _____
Jack R. Calhoun
Hearings Examiner

* *

CERTIFICATE OF MAILING

I, Jennifer Jacobsen, hereby certify and state that on the 12 day of ~~September~~ October, 1979, a true and correct copy of the above captioned FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was mailed to the following:

David Gliko
City Attorney
City of Great Falls
P.O. Box 5021
Great Falls, MT 59403

D. Patrick McKittrick
Attorney at Law
315 Davidson Building
3 Third Street North
P.O. Box 1184
Great Falls, MT 59403

Gerald E. Pottratz
Construction and General Laborers
Local No. 1334 AFL-CIO
1112 Seventh Street South
Great Falls, MT 59403

Jennifer Jacobsen

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